UNITED STATES
v.
CASCADE ORNAMENTAL BUILDING STONE, INC., ET AL.

IBLA 70-649 Decided December 29, 1972

Appeal from decision (Or-5873) by Administrative Law Judge Rudolph M. Steiner finding there was not a discovery of a valuable mineral deposit within lode mining claims, but dismissing without prejudice the Government's contest complaint against the claims.

Affirmed in part, reversed in part.

Mining Claims: Discovery: Marketability

Mere speculation that a market for stone may be developed does not satisfy the prudent man-marketability test of discovery of a valuable mineral deposit.

Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Discovery: Marketability

The profitable marketability of uncommon varieties of stone within a mining claim located after the Surface Resources Act of July 23, 1955, must be established independently of sales of common varieties of stone within the claim.

Mining Claims: Discovery: Marketability

A contention that lack of title to mining claims prevents production and sales of stone from the claims does not relieve a claimant of his burden of showing evidence more reliable than mere statements of proposed operations and proposed marketing efforts to establish that stone can be marketed profitably from the mining claims.

Mining Claims: Contests -- Mining Claims: Determination of Validity -- Rules of Practice: Government Contests

In a Government contest inquiring into the validity of mining claims, a finding of lack of discovery of a valuable mineral

deposit determines that the claims are invalid, and an Administrative Law Judge errs after making such a finding in refusing to declare such claims to be invalid or null and void and in dismissing the Government's contest complaint.

Mining Claims: Lode Claims -- Mining Claims: Placer Claims

Lode claims cannot validly be located for deposits of building stone which under the Act of August 4, 1892, can be located only as placer claims.

APPEARANCES: Elden M. Gish, Esq., Office of the General Counsel, United States Department of Agriculture, Portland, Oregon, for contestant; James S. Turner, Esq., of Murray, Armstrong & Vander Stoep, Chehalis, Washington, for contestee.

OPINION BY MRS. THOMPSON

The United States Department of Agriculture (hereinafter termed contestant) has appealed from an Administrative Law Judge's decision 1/ dated May 22, 1970, which dismissed without prejudice the Government's complaint filed against Cascade Ornamental Building Stone, Inc., et al., (hereinafter termed contestee).

This appeal involves the Day Break Mine Lode Nos. 1 to 12, inclusive, and Nos. 20 to 27, inclusive, in the Gifford Pinchot National Forest, Lewis County, Washington. The claims were located in 1959, 1960, or 1961, by individuals who transferred their ownership to Cascade Ornamental Building Stone, Inc., in consideration for stock.

The Government instituted this contest against these claims on September 7, 1965. The complaint charged that:

a. The material found within the limits of the claims is not a valuable mineral deposit under section 3 of the Act of July 23, 1955 (69 Stat. 367[8]; 30 U.S.C. 601[611]).

b. No discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present cannot be marketed at a profit and

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1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

it has not been shown that there exists an actual market for these materials.

The Government requested that the claims be declared null and void.

The contestees answered denying the charges and alleging affirmatively that there is a valuable mineral deposit under section 3 of the Act of July 23, 1955, and a discovery of a valuable mineral deposit of "building and/or ornamental stone which can be marketed at a profit." On August 6, 1969, an amendment to the answer was filed by contestee stating:

> (a) That material found within the limits of the claims is a valuable mineral deposit under Sections 1 and 3 of the Act of August 4, 1892 (27 Stat. 348; 30 U.S.C. 161), and under Section 3 of the Act of July 23, 1955 (69 Stat. 368, amended September 28, 1962, Pub. L. 87-713, Sec. 1, 76 Stat. 652; 30 U.S.C. 611).

This was resubmitted and accepted at the hearing (Tr. 5-6).

The stone within the claims is a rhyolite. Following a hearing held on August 6, 1969, the Judge found that rubble and ashlar stone within the claims are common varieties of stone within the meaning of the Act of July 23, 1955. However, he found that the rhyolite occurring in a columnar or polygon form has a unique property giving it a distinct and special value qualifying it for uses in the building trades over and above the uses of "common variety" materials, and was therefore locatable under the mining laws as an uncommon variety of stone. Nevertheless, he found that there was insufficient evidence to establish that the columnar stone is marketable for uses in the building trades over and above the uses of common variety materials, and thus does not constitute a valuable mineral deposit within the meaning of the mining law. He refused to declare the claims null and void as requested by the prayer of the complaint, stating that a decision to deprive the contestee of his possession of the deposits would serve no useful purpose, but would "tend to impede and discourage" the development of the deposits. He stated the contestee "may proceed to develop a market for that stone which occurs in unique columnar form", but cautioned that the decision did not authorize the removal of the common varieties of stone.

Contestant, on appeal, contends the Judge erred in two respects: (1) in finding that the columnar block deposits of rhyolite are an uncommon variety of building stone; (2) in not declaring the claims null and void in light of his finding that there was no discovery of a valuable mineral deposit. In response to this appeal, contestee,

on the other hand, contends: (1) there are properties in the other building stone found on the claims in addition to its columnar formation which make it an uncommon variety; (2) the stone on the claims can be marketed at a profit; and (3) in any event, assuming arguendo the correctness of the Judge's finding that the requisite marketability was not established, the Judge correctly ruled that the contestee may proceed to develop a market for that stone which occurs in unique columnar form.

The Judge found that stone sold for rubble and ashlar did not command any higher price in the market than ordinary common varieties of stone. We sustain the finding that such stone is a common variety. We find, however, that the evidence is not satisfactory with respect to the issue of whether or not the columnar type of stone is an uncommon variety within the meaning of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1970). That section provided that "'common varieties' does not include deposits * * * of materials which are valuable because the deposit has some property giving it distinct and special value * * *." However, assuming for the purposes of this decision, the correctness of the Judge's finding on that issue, the determinative issue is whether or not the marketability-prudent man test has been satisfied to establish the existence of a valuable deposit of mineral within the claims and the consequences flowing from such a determination.

There must be a finding that the Castle v. Womble, 19 L.D. 455, 457 (1894), prudent man test, as complemented by the marketability at a profit standard, has been satisfied to ascertain whether there has been a discovery of a valuable mineral deposit under the mining laws to sustain a claim for building stone. United States v. Coleman, 390 U.S. 599 (1968).

On the issue of marketability, we sustain the Judge's finding that the contestees did not show that the columnar type stone could be profitably marketed from the claims for uses over and above the uses of common varieties of stone. The Judge has discussed the evidence in some detail, and we see no necessity to repeat his discussion. It suffices to say that most of the evidence submitted by contestees on this point was in the nature of prospective possibilities for promoting the stone. Although there was testimony that the stone may possibly be able to be used for some purposes in the building trades for which common varieties may not be used, no actual sales for such purposes had been made and the prospect is merely speculative. A speculation that a market may be able to be developed for the material is not sufficient. As stated in Barrows v. Hickel, 447 F.2d 80, 83 (9th Cir. 1971):

> The 'marketability test' requires claimed materials to possess value as of the time of their discovery. Locations based on speculation that there may at some future date be a market for the discovered material cannot be sustained. What is required is that there be at the time of discovery, a market for the discovered material that is sufficiently profitable to attract the efforts of a person of ordinary prudence.

The few sales of material from the claim of the rubble and ashlar type veneer stone which the Judge found to be uncommon varieties would not establish the marketability at a profit of any uncommon variety stone within the claim. The profitable marketability of the uncommon varieties must be established independently from the sales of the common varieties. See United States v. Richard M. Lease, 6 IBLA 11, 79 I.D. 379 (1972). In any event, there was no showing that those sales were profitable when made. They were not of significant amounts and had been made from the claims years prior to the bringing of this contest.

The thrust of contestees' contentions concerning the lack of any significant production from the claims and marketing success is that until title to the claims can be secured, marketing cannot be successful, because sellers would not be able to depend upon delivery of stone from the claims. We note that it was not until after this contest had been initiated that contestees hired their expert consultant to examine the claims, test the materials, and ascertain the marketing potentialities. In any event, the contention that lack of title to the claims prevents production and sales does not relieve the claimant of his burden of submitting evidence more reliable than mere statements of proposed operations and proposed marketing efforts that the stone can be marketed at a profit from the claims. United States v. Harold Ladd Pierce, 75 I.D. 270, 283 (1968); cf. Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied 398 U.S. 950 (1970).

Since we sustain the Judge's finding that the marketability-prudent man test has not been satisfied here, we come to the issue raised by contestant as to the Judge's failure to declare the claims null anv void. We believe the Judge's failure to do so reflects a misunderstanding of his function in a contest proceeding inquiring into the validity of a mining claim and of the mining law. The Government may initiate a contest to determine the validity of mining claims even though no patent application has been filed by the claimant. Davis v. Nelson, 329 F.2d 840, 846 (9th Cir. 1964). Until a mining claimant makes a discovery of a valuable mineral deposit,

he has no rights to the land against the United States, and the United States can withdraw or otherwise dispose of the land without giving him further notice. United States v. Kenneth F. and George A. Carlile, 67 I.D. 417 (1960). If the lands are not withdrawn, a claimant whose claims are invalidated in a Government contest determining the issue of discovery may resume occupation of the land, or remain in occupation. So long as he is engaged in persistent and diligent prosecution of work looking to a discovery of a locatable mineral he has certain rights against claimants other than the United States under the doctrine of pedis possessio. Id.

As between the United States and a mining claimant, a mining claim is either valid or invalid depending upon its facts. An Administrative Law Judge may not avoid his duty in a contest to determine, in accordance with the facts and law, the validity or invalidity of a claim by attempting to place the claims in a state of legal limbo. See United States v. William J. Bartels, Sr., et al., 6 IBLA 124 (1972). Any lesser determination as to the rights between a mining claimant and the United States where the issue of discovery of a valuable mineral deposit has been raised has been created as a special exception to the mining laws by Congress, such as in the section 5 proceeding under the Surface Resources Act (30 U.S.C. § 613 (1970)), to determine the rights to manage and use the surface resources of claims located prior to that Act. Arthur L. Rankin, 73 I.D. 305 (1966). The necessary consequence then of a finding in Government contests, apart from the section 5 proceeding under the Surface Resources Act, that there has not been a discovery of a valuable mineral deposit is that the claims are not valid and appropriately they should so be declared. United States v. Bartels, supra. The rationale for this conclusion in proceedings contesting mineral patent applications, as in United States v. Carlile, supra, and United States v. Bartels, supra, applies with even more force in this proceeding where the Government is seeking the validity determination in the absence of a patent proceeding.

There is a further reason in this case which was not considered in the proceedings below for finding the claims are invalid. The use for which the stone on the claims is sought is for building stone purposes. In its amended answer the contestee asserted rights to the claims under the Building Stone Act of August 4, 1892. Under that Act, "lands that are chiefly valuable for building stone" may be located "under the provisions of the law in relation to placer mineral claims". 30 U.S.C. § 161 (1970). Apparently these claims were all located as lode claims being described by name as lode claims. If the claims contain no other minerals than building stone they could not properly be located as lode claims and would be invalid for that reason regardless of any other reason. United

States v. Clarence T. Stevens and Mary D. Stevens, 77 I.D. 97, 103 (1970), aff'd mem., Clarence T. Stevens and Mary D. Stevens v. Hickel, Civ. No. 1-70-94 (D. Idaho, June 4, 1971).

Accordingly, pursuant to 43 CFR 4.1, the decision of the Judge is affirmed as to his finding of a lack of discovery of a valuable mineral deposit within the claims, and is reversed as to his dismissal of the Government's complaint and his ruling that the claims need not be declared null and void. The claims are declared null and void for the reasons stated in this decision.

Joan B. Thompson

I concur:

Martin Ritvo

Anne Poindexter Lewis.